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In the Supreme Court of the United States

OCTOBER TERM, 1967

LEON W. SCALES, ET AL., PETITIONERS

v.

ROBERT A. RIDDELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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No. 992

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ROBERT A. RIDDELL

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In these six consolidated income tax refund cases, the district court entered three "judgments." On February 17, 1966, the district court entered a "Summary Judgment" ordering that "the defendant refund to" petitioners certain "taxes * * * with interest from the date of payment" on certain "transactions * * * to the extent that such taxes were assessed on the net proceeds as ordinary income and not as capital gain."

On May 31, 1966, upon stipulation of the parties, the court entered a second "Judgment," that set forth the order of February 17, 1966, and recited that the earlier order was only a partial summary judgment, leaving for further litigation the factual issue, common to all six cases, of the fair market value of a half interest in a certain 114 acres of land [1] (Pet. App. 2).

The third, so-called "Stipulated" judgment (Pet. App. 2-3), entered on March 16, 1967, recited the agreement of the parties that the fair market value of this land was $250,000, that no further issues remained to be litigated, and that "therefore, this Stipulated Judgment coupled with the Judgment entered on February 17, 1966 constitutes a final judgment in this matter."

The Court of Appeals for the Ninth Circuit denied petitioners' motion to dismiss respondent's appeal, which was based on the ground, *inter alia*,[2] that no appeal lies from a consented judgment. The appeal remains pending below.

There is no basis for issuance here of a writ of certiorari before final judgment in the court of appeals. Respondent's appeal is in no event taken from a con-

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[1] Another issue concerning the deductibility of certain alimony payments was to be litigated in one of the six consolidated cases.

[2] Petitioners apparently do not reassert here the other two grounds advanced in support of their motion to dismiss: (1) that the court of appeals lacks jurisdiction because respondent's notice of appeal was filed following the order of February 17, 1966; and (2) that respondent's late filing of the record required dismissal.

sented judgment, so that there is no error in the decision below. Nor is there a conflict or any other occasion for review in this Court.

1. These cases are currently pending on the merits in the court of appeals. This Court ordinarily declines to review such interlocutory orders as the one below, unless there is a showing of extraordinary circumstances. See *American Const. Co.* v. *Jacksonville Railway*, 148 U.S. 372. Because there is no greater basis here for review before judgment than such inconvenience as the "final judgment" rule underlying federal appellate review regularly occasions when a motion to dismiss is denied, petitioners should be left to the ordinary course of seeking review here when and if the court of appeals enters a final judgment adverse to their cause. *American Const. Co.* v. *Jacksonville Railway, supra; Chicago, St. Paul &c. Railway* v. *Roberts*, 141 U.S. 690; *U. S. Alkali Assn.* v. *United States*, 325 U.S. 196; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21.

2. The issue here is not, as the petitioners state (Pet. 2), whether a consent or stipulated judgment is appealable, but whether the district court's judgment is a consent judgment. In the orders of February 17 and May 31, 1966, the district court, on the basis of a contested motion for summary judgment, disposed of the question whether money and land petitioners received as holders of certain deeds of trust were taxable as ordinary income or as capital gain. That decision left open a third issue concerning the fair market value of the land. This third issue was the only matter *stipulated* or *agreed* to through the so-called

"Stipulated Judgment" of March 16, 1967. The limited effect of the "Stipulated Judgment" is made plain by its recitation that it was to be "coupled with the judgment entered on February 17, 1966 * * *." Just as plainly, respondent remained free to dispute on appeal the matters decided in 1966 on the basis of an adversarial contest.

The petition for certiorari should be denied.

Respectfully submitted.

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